

1505630 (Migration) [2016] AATA 3902 (18 May 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Paschal Inmidowojo Akeje

VISA APPLICANT: Mrs Rufina Ojoma Akeje

CASE NUMBER: 1505630

DIBP REFERENCE(S): OSF2013090639

MEMBER: Hugh Sanderson

DATE: 18 May 2016

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2) of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 18 May 2016 at 3:24pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 March 2015 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 26 November 2013 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant. No decision appears to have been made in respect of the applications of the second named visa applicants, that is the children of the parties.

BACKGROUND

4. The visa applicant is a citizen of Nigeria and is currently 41 years old.
5. The review applicant is a citizen of Nigeria and is currently 51 years old. He first entered Australia on 7 July, 2008 holding a subclass 676 Tourist visa. He then departed Australia on 23 July 2008. He returned to Australia on 31 July 2008 on a subclass 676 Tourist visa. The review applicant applied for a Student visa which was refused by the department. He filed a review of that decision to the tribunal (different constituted), however, withdrew this application before any hearing was conducted by the tribunal.
6. The review applicant then applied for and was granted a subclass 820 Partner (Temporary) visa on the basis of a claimed relationship he had with Patricia Lucas. The applicant was granted a subclass 801 Partner (Residence) visa on 5 June 2012. He now has the right to reside permanently in Australia.
7. The review applicant's movement records show that he has travelled out of Australia as follows:
 - From 24 July 2012 to 20 September 2012;
 - From 29 August 2013 to 1 October 2013;
 - From 14 January 2015 to 2 March 2015;
 - From 22 July 2015 to 30 September 2015; and
 - From 13 April 2016 to 14 May 2016.
8. The parties claim that they first met each other in Nigeria in 1996 and a relationship developed after that time. They were married on 16 April, 2001. They have three children, Leonard, currently 14 years old, Catherine, currently 12 years old and Faushina, currently 10 years old. In statements provided to the department from the parties, there was no

explanation as to the break in their relationship when the review applicant was living in Australia and claiming to be in a relationship with Patricia Lucas.

9. The department requested further information in respect of the end of the relationship between the review applicant and Patricia Lucas. The review applicant provided a statement where he made the following claims:
 - The review applicant and Ms Lucas had entered a joint lease together and were planning to sponsor the review applicant's children to live with him in Australia;
 - At the end of June 2013 the review applicant came home and found Ms Lucas with another man and so left the home that night to stay in his car;
 - Ms Lucas then told the review applicant that she wanted to end the relationship, but only would allow him to see their child, Ele-Ojo who was currently five years old, if he asked before coming over;
 - At the time of the separation, Ms Lucas was pregnant to the man the review applicant found her with on the night he came home; and
 - The relationship the review applicant had with Ms Lucas ended in July 2013 and she was now living with another man.
10. The review applicant returned to Nigeria and remarried the visa applicant on 5 September, 2013. A copy of the marriage certificate has been provided to the department.
11. The delegate noted that it was claimed the review applicant's relationship with Ms Lucas ended almost exactly 2 years after the lodgement of the Partner visa and the grant of his subclass 801 Partner (Residence) visa. It was claimed that within two months of this "surprise" breakup he had reinitiated his relationship with the visa applicant, despite there being no evidence of any communication between them.
12. The delegate found that it was likely that the review applicant's relationship with Ms Lucas was not genuine and that his current visa may have been obtained by misrepresentation should be considered to cancellation. The delegate found that the review applicant had deliberately intended to mislead the department and that his testimony was unreliable. The delegate was not satisfied the parties were in a genuine and continuing relationship and therefore the visa applicant did not meet the definition of the spouse of the sponsoring partner in s.5F(2)(c). Accordingly, the delegate refused the application.

PROCEEDINGS BEFORE THE TRIBUNAL

13. The review applicant appeared before the tribunal on 16 May 2016 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant and a family friend of the review applicant. The review applicant was represented in relation to the review by his registered migration agent who attended the hearing.
14. The review applicant provided further information to the tribunal including the following:
 - Photos of the review applicant together with his family in Nigeria;
 - Evidence from the review applicant's phone showing calls made to the visa applicant; and
 - Evidence of money being sent by the review applicant to the visa applicant.

15. The review applicant and visa applicant provided consistent information as to various aspects of their relationship. This included details of when the review applicant has travelled to Nigeria, the reasons for that travel and the activities he has participated in while there. They provided consistent information as to his contact with the visa applicant and their children during his claimed relationship with Ms Lucas.
16. The review applicant claimed that when he travelled back to Nigeria in 2009 it was to see his children and spent time with the visa applicant. He said the visa applicant was not well. He claimed that he was assuring the visa applicant at that time that everything would be all right, but she was distressed about being separated from him.
17. The review applicant said that Ms Lucas was living in Wilmont with her new partner and her two children. She said that Ms Lucas and her partner had their first child in April 2014. He said that he was seeing his child, Eliojo, every week. He said that he made arrangements with Ms Lucas to see her at McDonald's or some other venue. He said that Eliojo would stay overnight at his place about once every two months. This was because Ms Lucas did not want to lose the status of 100% carer of their child. He said that he was paying child support at the rate of \$135 per week.
18. The review applicant said that he was sending the visa applicant from \$400 to \$500 per month for the support of their children. He said that he also sent money for the school fees.
19. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. The issue in the present case is whether the visa applicant is the spouse of the review applicant as defined in s.5F of the Act. This, in part, requires that the parties be in a genuine and continuing relationship.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

21. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
22. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

23. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties were originally married on 16 April 2001. They were divorced on 25 September 2009. The review applicant then claims he commenced a

relationship with Ms Lucas who sponsored him for a Partner visa. They were never married and claimed to live together in a de facto relationship. The parties were married for a second time in Nigeria on 5 September 2013. There is nothing to indicate that the marriage between the parties is not valid.

24. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

25. Neither the review applicant nor the visa applicant have any significant assets of their own. They are currently living in different countries. It is not surprising, therefore, that there is little evidence of any joint ownership of any major assets or joint liabilities. The tribunal accepts the evidence that the review applicant has been sending regular sums of money to the visa applicant for her and their children's financial support. He has also been providing further money to meet the expenses of the children's schooling in Nigeria.
26. Overall, the evidence before the tribunal indicates the financial aspects of the relationship support a finding that the parties are in a genuine and continuing relationship.
27. Since marrying the visa applicant for a second time, the review applicant has travelled to Nigeria to be with the visa applicant and his children on three separate occasions. He has lived with the visa applicant who is living in the family home of the review applicant with his mother. The tribunal accepts the evidence of the parties that over this time the parties jointly cared for and were supporting their children and were living together as a married couple. This evidence of the nature of the household and supports a finding that the parties are in a genuine and continuing relationship.
28. The parties have provided photos of themselves together in Nigeria. Evidence has been provided by friends and family members attesting to the fact that they believe the parties are in a genuine and continuing relationship and that their marriage is recognised by them.
29. The parties were first married in April 2001. At that time, the visa applicant was pregnant with her first child with the review applicant. They have had two other children since then. From the time of their first marriage they have had a relationship with each other for 15 years. The parties claim to have divorced each other in September 2009 and did not reconcile their relationship again until 2013 after the applicant had been granted permanent residence in Australia. This issue is discussed below.
30. Since being married for the second time on 5 September 2013 the parties have now been married for almost 3 years and the review applicant has travelled to Nigeria on three separate occasions since his remarriage to the visa applicant.
31. The parties have three children together. The review applicant is renting accommodation which is a three-bedroom home. He organised this accommodation in the anticipation of the visa applicant and his children being with him soon after the application was filed.
32. The tribunal is satisfied that the commitment the parties have shown to each other over the course of their relationship is indicative of a genuine and continuing relationship.
33. One of the most significant concerns in this application is the immigration history of the review applicant and the way in which he was granted permanent residence in Australia.
34. The sponsor of the review applicant for his Partner visa was Ms Lucas. The review applicant claimed his relationship with Ms Lucas ended in June 2013, the month after he was granted

the subclass 801 Partner (Residence) visa. It appears that he recommenced immediately his relationship with the visa applicant and married her three months after ending his relationship with Ms Lucas.

35. The circumstances raise serious concerns as to whether the relationship between the review applicant and Ms Lucas was ever a genuine relationship. The fact is that the review applicant has a child with Ms Lucas. He continues to pay child support for this child and has contact with her. The review applicant was granted the Partner (Residence) visa. No steps have been taken to cancel this visa. As there is a child of that relationship it is unlikely that the visa would be cancelled. The review applicant has since been granted Australian citizenship.
36. The tribunal has significant concerns as to whether the relationship the review applicant had with Ms Lucas was exclusive and he maintained his relationship with the visa applicant over that period. The tribunal also has concerns whether the review applicant's relationship with Ms Lucas was part of a long term plan to bring the visa applicant and his children to Australia.
37. The issue before the tribunal is not whether the review applicant's Partner visa which he was granted in 2013 should be cancelled, but whether the visa applicant is the spouse of the review applicant as defined in s.5F of the Act and whether the visa applicant meets the criteria in cl.309.211 and cl.309.221.
38. As set out above, the tribunal has found that the circumstances of the parties are indicative of a genuine and continuing relationship. The parties have three children together and have plans for their future together in Australia. The tribunal has considered the circumstances of the parties both individually and cumulatively. The tribunal is satisfied that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing and it is their intention to live together when able.
39. Given these findings the tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship.
40. Therefore the visa applicant meets cl.309.211 and cl.309.221.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa. The decision of the department does not make reference to the secondary applicants who were included in the visa application. As the first named visa applicant meets this criteria for the grant of the visa, the applications for the second named visa applicants should be considered in full.

DECISION

42. The tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211(2) of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).